Extendicare Health Services, Inc. d/b/a River's Bend Health and Rehabilitation Service *and* American Federation of State, County and Municipal Employees, AFL–CIO, Local 913. Case 30–CA–16746–1

June 29, 2007

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER AND WALSH

On June 29, 2005, Administrative Law Judge Arthur J. Amchan issued the attached decision. The Respondent filed exceptions, a supporting brief, an answering brief, and a reply brief. The General Counsel filed cross-exceptions, a supporting brief, and an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions[1] and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

This case involves allegations of violations of Section 8(a)(1) and (5) arising in the context of the parties' negotiations for an initial collective-bargaining agreement. The judge found that the Respondent violated Section 8(a)(1) in the following three respects: (1) threatening employees with termination if they engaged in a strike, "regardless of whether or not the strike was lawful;" (2) soliciting employees to report the protected activities of other employees to the Respondent; and (3) threatening employees with discipline if they engaged in protected activities. The judge dismissed the complaint allegation that the Respondent violated Section 8(a)(5) by increasing the cost of employee meals without prior notice to the Union and without affording it an opportunity to bargain.

For the reasons stated by the judge, we affirm his dismissal of the 8(a)(5) allegation. For the reasons stated below, we reverse the judge's findings of three violations of Section 8(a)(1). Accordingly, we shall dismiss the complaint in its entirety.

I. FACTS

The facts, set forth more fully in the judge's decision, can be summarized as follows.

The Respondent operates nursing homes throughout the United States. The Respondent purchased the River's Bend nursing home in Manitowoc, Wisconsin, on January 1, 2004.[2] The Union had a collective-bargaining relationship with the prior owner of the facility. The Respondent voluntarily recognized the Union, and the parties entered into contract negotiations.

On January 15, the Union sent a letter to the Respondent and the Federal Mediation and Conciliation Service (FMCS), informing them that the Union may picket, strike, or engage in other concerted refusal to work on or after January 29. On January 19, the Union informed the Respondent and the FMCS that it revised the strike notice to indicate that "the strike will commence no earlier than 12:01 on the morning of January 31, 2004."[3]

Between January 15 and 21, Candy Gremore, the Respondent's administrator, received a report from an employee that she had been threatened that she would have to go on strike "or else." Gremore reported the threat to Liz Reiss, the Respondent's regional director of operations.

On January 21, Reiss sent a letter to the employees, stating in pertinent part as follows:

> It is your decision whether or not to go on strike. What the Union may not tell you is that strikers do not receive a paycheck, strikers immediately lose company-paid medical benefits, and strikers do not get unemployment benefits. In a strike the Company would be forced to hire replacements to be sure we can take care of the residents. This puts each striker's continued job status in jeopardy.
>
> Some employees are telling us they are being harassed and threatened because they don't want to go on strike. We will not tolerate any River's Bend employee being harassed or threatened for any reason, and ask that you report any such conduct to management so we can ensure you can continue to work in a non-threatening environment.

II. ANALYSIS

A. Alleged Threat of Termination If Employees Engaged in a Strike

The judge found that the Respondent's statement that the hiring of replacements "puts each striker's continued job status in jeopardy" constituted a threat of termination in violation of Section 8(a)(1). We disagree.

[1] No exceptions were filed to the judge's dismissal of the complaint allegation that the Respondent violated Sec. 8(a)(1) of the Act by telling employees that they had no obligation to pay union dues.

[2] All dates are in 2004, unless stated otherwise.

[3] The Union thereafter revoked its January 19 strike notice. The judge found that the Union's strike notices of January 15 and 19, did not comply with the requirements of Sec. 8(g) of the Act. There is no exception to that finding.

Eagle Comtronics, 263 NLRB 515 (1982), cited by the judge, is the leading case defining the extent of an employer's obligation, on informing employees that economic strikers may be replaced, to provide an accurate summary of employee rights under *Laidlaw*.[4] The Board held that "an employer does *not* violate the Act by truthfully informing employees that they are subject to permanent replacement in the event of an economic strike." Id. (Emphasis in original.) The Board explained that "an employer may address the subject of striker replacement without fully detailing the protections enumerated in *Laidlaw*, so long as it does not threaten that, as a result of a strike, employees will be deprived of their rights in a manner inconsistent with those detailed in *Laidlaw*." 263 NLRB at 516. In sum, "[a]s long as an employer's statements on job status after a strike are consistent with the law, they cannot be characterized as restraining or coercing employees in the exercise of their rights under the Act." 263 NLRB at 516.[5]

The Board's holding in *Eagle Comtronics* was premised on Section 8(c) of the Act, which "permits an employer to make predictions about the consequences of union representation, provided its remarks are not accompanied by a threat of reprisal or force or promise of benefit." *Unifirst Corp.,* 335 NLRB 706, 707 (2001). As such, absent accompanying threats, *Eagle Comtronics* "articulates the Board's policy of resolving in the employer's favor any ambiguity occasioned by a failure to articulate employees' continued employment rights when informing them about permanent replacement in the context of an economic strike." Id.

Applying these principles here, we find that the Respondent's statement did not constitute an unlawful threat. Significantly, the Respondent did *not* say that replaced strikers would permanently lose their jobs. Instead, the Respondent stated that the hiring of replacements "puts each striker's continued job status in jeopardy." This statement is entirely consistent with *Laidlaw* and therefore lawful. If, at the conclusion of an economic strike, the strikers' positions are filled by permanent replacements, the employer is legally justified in not reinstating the strikers under *Laidlaw* and its progeny.[6] In a very real sense, then, the hiring of permanent replacements places strikers' "job status in jeopardy" because when the strike ends they may not have a job to which they can immediately return. Instead of working and earning a paycheck, they must wait for a vacancy to arise in their prestrike position or a substantially equivalent position.[7] Moreover, because the Respondent's statement about "job status" was not accompanied by any threats, any ambiguity in it must be construed in the Respondent's favor. *Unifirst Corp.,* supra.

Contrary to our dissenting colleague's contention, it is immaterial that the Respondent did not provide employees with a detailed explanation of the *Laidlaw* doctrine. As stated above, *Eagle Comtronics* expressly holds that an employer is under no obligation to "explicate all the consequences of being an economic striker," so long as its "statements on job status after a strike are consistent with the law." 263 NLRB at 516. That is precisely the situation here.

Indeed, in subsequent cases, statements similar to the one in issue here have been found to be permissible. For example, in *Novi American*, 309 NLRB 544 (1992), the Board found that it was unobjectionable for an employer to state that "striking employees can be replaced by permanent replacements, and may not have a job when the strike is over." The Board held that the employer "did not threaten that, as a result of a strike, employees would be deprived of their rights in a manner inconsistent with those in *Laidlaw*." Id. at 545. Rather, the employer "was simply informing employees that when a strike ends, strikers may not have a job to which they can *immediately* return." Id. (Emphasis in original.)[8]

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[4] *Laidlaw Corp*., 171 NLRB 1366 (1968), enfd. 414 F.2d 99 (7th Cir. 1969).

[5] In *Eagle Comtronics* the Board provided the following example of a prohibited comment: Warning permanently replaced strikers that they "would permanently *lose* their jobs." 263 NLRB at 516 fn. 8 (emphasis in original). Assertions of this nature are impermissible because they are inconsistent with a striker's *Laidlaw* right to reinstatement.

[6] See *NLRB v. Int'l Van Lines*, 409 U.S. 48, 50 (1972) ("[A]n employer may refuse to reinstate economic strikers if in the interim he has taken on permanent replacements."); *Zimmerman Plumbing & Heating Co*., 334 NLRB 586, 588 (2001) ("The Board has recognized that one legitimate and substantial justification for not immediately reinstating former strikers is a bona fide absence of available work for the strikers in their prestrike or substantially equivalent positions.")

[7] Our dissenting colleague asserts that in making this finding we have gone beyond the issues and arguments raised in the Respondent's exceptions. We disagree. The complaint allegation, as to which the General Counsel bears the burden of proof, is that the Respondent unlawfully threatened strikers with job loss. To be sure, the primary thrust of the Respondent's exceptions and brief is that the challenged statement was lawful because it described possible consequences of participating in a strike that violated Sec. 8(g). We do not, however, view the Respondent as having conceded that the challenged statement was unlawful if its 8(g) argument is rejected. To the contrary, the Respondent's exceptions assert that the judge erred in concluding "that in the absence of any discussion of Section 8(g) and the inadequacy of the Union's strike notices, an employee would reasonably interpret the January 21 letter as threatening employees with job loss in the event of any strike, regardless of its lawfulness . . . . The basis for this exception is that the record fails to support this Conclusion and it is inconsistent with relevant Board law." In our view, this exception is sufficient to place in issue the judge's application of *Eagle Comtronics,* supra.

[8] *Novi American* has been cited with approval in subsequent Board decisions, see, e.g., *Manhattan Crowne Plaza,* 341 NLRB 619 (2004), and has never been overruled.

Additionally, in *John W. Galbreath & Co*., 288 NLRB 876, 877 (1988), the Board found that it was unobjectionable for the employer to advise employees that "strikers can lose their jobs[;] . . . [h]owever, they are not discharged, technically speaking. But they're not working . . . ." The Board reasoned that "the statement may leave some employees puzzled about how economic strikers can return to work, but it does not imply that they are discharged."

The cases relied on by the judge and the dissent are distinguishable because in each one the employer exceeded the scope of permissible speech delineated in *Eagle Comtronics* by threatening employees with permanent job loss. See the discussion in fn. 5, above. Thus, in *Wild Oats Markets, Inc*., 344 NLRB No. 86, slip op. at 24–25 (2005), the employer stated that "when Unions go on strike, . . . many have lost their jobs because striking workers are replaced." Similarly, in *Kentucky River Medical Center*, 340 NLRB 536, 546 (2003), the employer stated that replaced strikers would be reinstated only if the employer had openings when the strike was over, "but if the [r]espondent did not then have such openings the employees would lose their jobs." The Respondent, in contrast, did not tell employees they would "lose their jobs," a phrase that the Board has found clearly conveys to the ordinary employee that his or her employment will be terminated.[9] Finally, in *Superior Emerald Park Landfill*, LLC, 340 NLRB 449, 462 (2003), the employer posted campaign literature that included the assertion that the law "does not require the Company to rehire you if you have been permanently replaced." This comment also goes well beyond the Respondent's statement regarding strikers' continued job status, and, unlike that statement, cannot be reconciled with the employees' right to reinstatement under *Laidlaw*.

Based on all of the above, we find that the Respondent did not threaten that, as a result of a strike, employees would be deprived of their rights in a manner inconsistent with *Laidlaw*. Therefore, the Respondent's statement was lawful under *Eagle Comtronics*. Accordingly, we reverse the judge's finding that the Respondent unlawfully threatened the employees with job loss in violation of the Act.

B. Alleged Solicitation of Employees to Report the Protected Activities of Other Employees

As stated above, the judge also found the following portion of the Respondent's January 21 letter to be unlawful:

> Some employees are telling us they are being harassed and threatened because they don't want to go on strike. We will not tolerate any River's Bend employee being harassed or threatened for any reason, and ask that you report any such conduct to management so we can ensure you can continue to work in a non-threatening environment.

According to the judge, employees receiving the letter could reasonably believe that the Respondent was asking them to report to management protected union activity that they viewed as unwelcome. We disagree.

As stated above, before sending the January 21 letter to employees, the Respondent received a report from an employee that she was told that she must go on strike "or else." Thus, in this case, there is evidence that an employee actually had been threatened. Under similar circumstances, the Board has held that an employer may lawfully assure employees that it will not allow them to be threatened by anyone and that it may ask them to report such threats. *Liberty House Nursing Homes*, 245 NLRB 1194, 1196–1197 (1979).[10] Accordingly, in the circumstances of this case, there was nothing unlawful in the Respondent's request that employees report "threat[s]" by other employees.

Therefore, we now turn to the Respondent's request that employees report instances of harassment. In *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646–647 (2004), the Board held that in determining whether an employer's maintenance of a work rule is unlawful, the Board will give the rule a reasonable reading and refrain from reading particular phrases in isolation. Under this standard, the Board first looks to "whether the rule *explicitly* restricts activities protected by Section 7." Id. at 646. (Emphasis in original.) If it does, then the Board will find the rule unlawful. If it does not, the violation is dependent upon a showing of one of the following: "(1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights." Id. at 647.

[9] *Baddour, Inc.,* 303 NLRB 275 (1991).

[10] Cf. *Winkle Bus Co*., 347 NLRB No. 108, slip op. at 2 (2006) (employer's letter asking employees to report union threats or coercion found unlawful where no record evidence that the company had in fact received reports of union misconduct or that any such misconduct had taken place); *New Haven Register*, 346 NLRB No. 98 fn. 2 (2006) (employer's memorandum asking employees to report union threats or coercion found unlawful where no evidence that any employee had engaged in such threats or coercion).

Chairman Battista dissented in *Winkle Bus* and would have found that employer's letter to be lawful. However, he agrees with Member Schaumber that the facts in *Winkle Bus* are distinguishable from the instant case.

In *Stanadyne Automotive Corp*., 345 NLRB No. 6, slip op. at 2–3 (2005), the Board applied the *Lutheran Heritage* standard to an employer statement prohibiting "[h]arassment of any type." The Board found initially that the statement did not explicitly restrict protected activity. Under the three-factor test set forth above, the Board further found that employees would not reasonably construe the statement to prohibit Section 7 activity, nor was the statement promulgated in response to protected union activity. Rather, the employer issued the statement in response to unsolicited reports it received of unprotected conduct during an organizational campaign. Finally, the statement was not applied to restrict the exercise of Section 7 rights. Accordingly, the Board concluded that the employer's statement did not violate Section 8(a)(1).

Applying the *Lutheran Heritage* standard here, we find that the Respondent's January 21 letter did not explicitly restrict activity protected by Section 7. As we stated in *Lutheran Heritage*, "some instances of harassment are not protected by the Act." 343 NLRB at 648. Therefore, a request that employees report instances of harassment to management is not tantamount to a request that employees report protected activity.[11]

Under the three-factor test described above, we find, first, that employees would not reasonably construe the Respondent's January 21 letter as requesting reports on the protected activities of other employees, particularly where, as here, the Respondent assured employees in the letter that "[i]t is your decision whether or not to go on strike." In addition, the Respondent described its concern as the limited one of ensuring that all employees "can continue to work in a non-threatening environment." Giving the Respondent's letter a reasonable interpretation and reading it as a whole, we cannot find that employees would reasonably construe the Respondent's message as requesting reports on conduct protected by Section 7.

Second, contrary to the dissent, the Respondent's January 21 letter was *not* promulgated in response to protected union activity. Rather, as in *Stanadyne*, supra, the Respondent issued the letter in response to unprotected conduct (the employee who complained to management that she had been threatened that she must go on strike "or else").

Third, there is no evidence that the Respondent's January 21 letter was applied to restrict the exercise of the employees' protected conduct. Rather, as stated above, the evidence shows that the Respondent issued the January 21 letter in response to reports of unprotected conduct.

In conclusion, for all the foregoing reasons, we reverse the judge and find that the Respondent's January 21 letter did not solicit employees to report the protected activities of other employees in violation of Section 8(a)(1).

C. Alleged Threat of Discipline If Employees Engaged In Protected Activities

Finally, the judge found that the portion of the Respondent's January 21 letter analyzed in the preceding section also constituted a threat of unspecified disciplinary action in violation of Section 8(a)(1). The judge reasoned that employees inclined to engage in protected activities could reasonably believe that such activities might be reported to the Respondent and that they could be disciplined as a result. However, we have found, contrary to the judge, that employees would not reasonably construe the Respondent's January 21 letter as requesting reports on the protected activities of other employees. Consequently, employees inclined to engage in protected activities would have no reasonable basis for believing that their conduct would be reported to the Respondent or that they would be disciplined as a result. Accordingly, we shall dismiss this complaint allegation as well.

ORDER

The complaint is dismissed.

Dated, Washington, D.C. June 29, 2007

Robert J. Battista, Chairman

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER WALSH, dissenting in part.

Relying on a rationale not advanced by the Respondent, the majority erroneously reverses the judge's finding that the Respondent unlawfully threatened employees with termination if they engaged in a strike. The majority also errs in reversing the judge's additional findings that the Respondent (1) unlawfully solicited employees to report the protected activities of other employees to management and (2) unlawfully threatened employees with discipline if they engaged in protected activities.

[11] The dissent contends that because "harassment" is an "elastic" term that may include protected activity, the Respondent's January 21 letter was unlawful. We disagree. Considering the context in which the letter arose, and the letter as a whole, we find it lawful under *Standadyne*, where the challenged statement also referred to "harassment."

For the reasons stated by the judge and the additional reasons set forth below, I would adopt the judge's decision in its entirety.[1]

I. FACTS

The material facts are essentially undisputed. On January 1, 2004,[2] the Respondent purchased the River's Bend nursing home. The Union had a collective-bargaining agreement with the prior owner of the facility that was in effect through June 30. The Respondent declined to adopt that agreement, but did agree to recognize the Union and commence collective-bargaining negotiations.

On January 15, the Union sent a letter to the Respondent and the Federal Mediation and Conciliation Service (FMCS), informing them that the Union may picket, strike, or engage in other concerted refusal to work on or after January 29. The Respondent replied on January 19, stating that the Union's notice did not comply with Section 8(g) of the Act. On January 19, the Union informed the Respondent and the FMCS that it revised the strike notice to indicate that "the strike will commence no earlier than 12:01 on the morning of January 31, 2004."

On January 21, the Respondent sent a letter to the bargaining unit employees criticizing the Union for "pushing you to go on strike." The letter stated that the Union attended just one bargaining session with the Company, that "the Company responded to *every one* of the Union's first proposals," but that the Union failed to "respond[ ] to *any* of the Company's first proposals. . . . This is no way to negotiate a contract. . . ." (Emphasis in original.)

Specifically in issue are the following two paragraphs of the Respondent's letter:

> It is your decision whether or not to go on strike. What the Union may not tell you is that strikers do not receive a paycheck, strikers immediately lose company-paid medical benefits, and strikers do not get unemployment benefits. In a strike the Company would be forced to hire replacements to be sure we can take care of the residents. This puts each striker's continued job status in jeopardy.
>
> Some employees are telling us they are being harassed and threatened because they don't want to go on strike. We will not tolerate any River's Bend employee being harassed or threatened for any reason, and ask that you report any such conduct to management so we can ensure you can continue to work in a non-threatening environment.

The Respondent's letter made absolutely no mention of any legal deficiency in the Union's strike notices. In a letter dated January 19, but transmitted to the Respondent on January 28, the Union revoked its January 19 strike notice.

II. ANALYSIS

A. The Respondent Threatened Employees with Termination If They Engaged In a Strike

The complaint alleges that the Respondent's statement that the hiring of replacements "puts each striker's continued job status in jeopardy" constituted a threat of termination in violation of Section 8(a)(1). The judge found that the issue posed by this complaint allegation was "complicated by the fact that the Union's strike notices of January 15 and 19 did not comply with the requirements of Section 8(g) of the Act."[3] The judge reasoned that if a strike had actually occurred, it would have been unlawful, and the strikers could have been legally discharged. However, the judge emphasized that the Respondent's letter did not even discuss Section 8(g) or the inadequacies of the Union's strike notices. In these circumstances, the judge found that "an employee would reasonably interpret the January 21 letter as threatening employees with the loss of their jobs in the event of any strike, regardless of its lawfulness." Accordingly, he concluded that the January 21 letter violated Section 8(a)(1).

The Respondent's exceptions and supporting brief advance only one narrow argument for reversing the judge's unfair labor practice finding: the Respondent's January 21 statement that the hiring of replacements "puts each striker's continued job status in jeopardy" did not violate Section 8(a)(1) because it was made in the context of the Union's threat to strike in violation of the notice requirements of Section 8(g). According to the Respondent, the "January 21 letter unmistakably responded to the Union's imminent threat to engage in an unlawful strike. It is too far a stretch to suggest it pertained to [a protected] strike."

The majority does not find merit in the Respondent's limited contention. Instead, the majority makes a very different and much broader argument for the Respondent, i.e., that the January 21 letter did not violate Section 8(a)(1) when analyzed in the context of a threat to engage in a protected strike. This argument is conspicuously absent from the Respondent's brief, which cites none of the cases relied on by the majority.

Like a court, the Board's general practice is not to raise arguments on a party's behalf. E.g., *Perdue Farms, Inc. v. NLRB*, 144 F.3d 830, 837 (D.C. Cir. 1998) ("Our

[1] I join the majority in affirming the judge's dismissal of the 8(a)(5) allegation of the complaint.

[2] All subsequent dates are in 2004.

[3] There is no exception to the judge's 8(g) finding.

dissenting colleague . . . criticizes the Board's case law. . . . Perdue, however, makes no such argument, and normally we do not address issues the parties fail to raise."); *Goer Mfg. Co*., 341 NLRB 732 fn. 2 (2004) ("We find it unnecessary to address our dissenting colleague's contentions because they were not raised by any party to this proceeding and are therefore not procedurally before the Board.") (citing, inter alia, *Avne Systems, Inc*., 331 NLRB 1352, 1354 fn. 5 (2000) ("We recognize that Respondent Avne raised a 10(b) defense. Our point is simply that Respondent Avne did not make the dissent's arguments in support of that defense.")). The Board should exercise similar judicial restraint here and limit its review of the judge's decision to the issues and arguments raised by the parties.[4]

As the majority has raised the broader issue, however, I shall address it as well. In *Eagle Comtronics*, 263 NLRB 515 (1982), the leading case in this area, the Board reviewed the *Laidlaw* rights of strikers with regard to reinstatement.[5] The Board reiterated the principle that an employer does not violate the Act by truthfully informing employees that they are subject to permanent replacement in the event of an economic strike. The Board held that an employer may address the subject of striker replacement without fully detailing the protections enumerated in *Laidlaw*, "so long as it does not threaten that, as a result of a strike, employees will be deprived of their rights in a manner inconsistent with those detailed in *Laidlaw*." Id. at 516.

Here, the Respondent went beyond a mere announcement of its right to replace striking employees. The Respondent elaborated on the meaning of the phrase "to hire replacements." This elaboration consisted of the Respondent's statement that the phrase meant that each striker's "continued job status" would be "in jeopardy." In so stating, the Respondent implied that it was within its discretion to terminate its employment relationship with the strikers, thereby eliminating all rights to reinstatement. Under *Laidlaw*, however, the "continued job status" of replaced strikers is not "in jeopardy;" to the contrary, *Laidlaw* squarely holds that they "retain their status as employees" and that they have important rights to reinstatement upon the departure of the replacements. 171 NLRB at 1369–1370. In short, the Respondent's statement constituted a threat that "as a result of a strike, employees will be deprived of their rights in a manner inconsistent with those detailed in *Laidlaw*." *Eagle Comtronics*, supra, 263 NLRB at 516.

The majority attempts to justify the Respondent's statement by arguing that, in a practical sense, the hiring of permanent replacements places strikers' "job status in jeopardy" because when the strike ends they may not have a job to which they can immediately return, but must instead wait for a vacancy to arise. The problem with this explanation is that it was never offered to the employees. The January 21 letter told them only that in a strike "the Company would be forced to hire replacements" and this "puts each striker's continued job status in jeopardy." As the judge recognized, "an employee would reasonably interpret the January 21 letter as threatening employees with the loss of their jobs in the event of a strike. . . ."[6]

In sum, under *Eagle Comtronics*, the Respondent could have limited its remarks to the truthful statement that economic strikers are subject to permanent replacement. Instead, it went further and starkly raised the specter of job loss. In so doing, it crossed the line carefully drawn by the Board in *Eagle Comtronics* and thereby violated Section 8(a)(1).[7]

[4] The majority denies that it has ventured beyond the issues and arguments advanced by the Respondent. The majority claims that its decision is anchored in the Respondent's exception 34, which reads as follows:

> 34. To the ALJ's Conclusion that in the absence of any discussion of Section 8(g) and the inadequacy of the Union's strike notices, an employee would reasonably interpret the January 21 letter as threatening employees with job loss in the event of any strike, regardless of its lawfulness. (J.D. p.4, ll. 38-41) The basis for this exception is that the record fails to support this Conclusion and it is inconsistent with relevant Board law.

This exception cannot bear the weight the majority places on it. The exception clearly places the Respondent's argument in the context of "the absence of any discussion of Section 8(g) and the inadequacy of the Union's strike notices." Then, citing the judge's decision, the Respondent merely asserts that his finding of an unlawful threat lacks support in the record and in Board law. The Respondent does not specifically articulate, either in its exceptions or its brief, the argument advanced by the majority. Under these circumstances, the Respondent has waived the grounds for reversing the judge on which the majority relies. See Sec. 102.46(b)(2) of the Board's Rules. ("Any exception . . . not specifically urged shall be deemed to have been waived.")

[5] *Laidlaw Corp*., 171 NLRB 1366 (1968), enfd. 414 F.2d 99 (7th Cir. 1969). "Specifically, striking employees retain the right to make unconditional offers of reinstatement, to be reinstated upon such offers if positions are available, and to be placed on a preferential hiring list upon such offers if positions are not available at the time of the offer." *Eagle Comtronics*, supra, 263 NLRB at 515.

[6] The majority also argues that the Respondent's "job-status-in-jeopardy" statement is entitled to a benign interpretation because it was not accompanied by any other threats. I disagree. In the very next paragraph of the January 21 letter, the Respondent unlawfully threatened employees with unspecified discipline if they engaged in protected activities. See the discussion in sec. II, C, infra.

[7] See, e.g., the following cases cited by the judge: *Wild Oats Markets, Inc*., 344 NLRB No. 86, slip op. at 24–25 (2005) (employer violated Sec. 8(a)(1) by stating that "when Unions go on strike, . . . many have lost their jobs because striking workers are replaced"); *Kentucky River Medical Center*, 340 NLRB 536, 546 (2003) (employer violated

B. The Respondent Solicited Employees to Report the Protected Activities of Other Employees to Management

As stated above, the judge also found the following portion of the Respondent's January 21 letter to be unlawful:

> Some employees are telling us they are being harassed and threatened because they don't want to go on strike. We will not tolerate any River's Bend employee being harassed or threatened for any reason, and ask that you report any such conduct to management so we can ensure you can continue to work in a non-threatening environment.

The judge reasoned that employees receiving the letter could reasonably believe that the Respondent was asking them to report to management protected union activity that they viewed as unwelcome. The judge is correct.

"It is well settled that the Act allows employees to engage in persistent union solicitation even when it annoys or disturbs the employees who are being solicited." *Ryder Transportation Services*, 341 NLRB 761 (2004), enfd. 401 F.3d 815 (7th Cir. 2005). Employers interfere with this right, and therefore violate Section 8(a)(1), "when they invite their employees to report instances of fellow employees' bothering, pressuring, abusing, or harassing them with union solicitation . . . ." *Greenfield Die & Mfg. Corp*., 327 NLRB 237, 238 (1998). Such employer statements have the "potential dual effect of encouraging employees to report to Respondent the identity of union . . . solicitors who in any way approach employees in a manner subjectively offensive to the solicited employees, and of correspondingly discouraging . . . solicitors in their protected . . . activities." *Arcata Graphics*, 304 NLRB 541, 542 (1991) (quoting *W.F. Hall Printing Co*., 250 NLRB 803, 804 (1980)).

Here, the Respondent asked employees to report to management if they were being "harassed" because they did not want to engage in a union-sponsored strike. "Harassment" is an "elastic" term that "may include protected . . . activity." *Bloomington-Normal Seating Co. v. NLRB*, 357 F.2d 692, 697 (7th Cir. 2004). Nothing in the Respondent's letter served to limit employees' understanding of what constitutes harassment; employees reasonably could conclude that encouraging fellow employees to participate in an economic strike was tantamount to "harassment." For these reasons, I would adopt the judge's finding that the Respondent violated Section 8(a)(1) by soliciting employees to report the protected activities of other employees to management.

Relying on *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646–647 (2004), in which Member Liebman and I dissented, and *Stanadyne Automotive Corp*., 345 NLRB No. 6, slip op. at 2–3 (2005), in which Member Liebman dissented, the majority finds (1) that the Respondent's January 21 letter was not promulgated in response to union activity, and (2) that employees would not reasonably construe the letter as requesting reports on the protected activities of other employees. The majority is wrong on both counts.

First, the Respondent's letter states that the Respondent has received reports of employees being harassed "because they don't want to go on strike." Thus, the Respondent's letter was expressly promulgated in direct response to union activity and violates Section 8(a)(1) under *Lutheran Welfare* for that reason alone.

Second, the Respondent's letter states that it "will not tolerate" harassment of any employee "for any reason." This is essentially the same rule against "[h]arassment of other employees, supervisors and any other individuals in any way" in *Lutheran Heritage*, which I would have found unlawful. As in *Lutheran Heritage*, nothing in the Respondent's letter limits the breadth of the prohibition. Thus, it would be reasonable for employees to understand the prohibition as reaching protected (but unwelcome) union solicitation. Such an overbroad prohibition violates Section 8(a)(1) because it would reasonably tend to interfere with, restrain, or coerce employees in the exercise of their Section 7 right to solicit support for the Union.

C. The Respondent Threatened Employees with Unspecified Discipline if They Engaged in Protected Activities

Finally, the judge correctly found that the portion of the Respondent's January 21 letter analyzed in the preceding section also constituted an unlawful threat of unspecified discipline. The judge reasoned that employees inclined to engage in protected activities could reasonably believe that such activities might be reported to the Respondent and that they could be disciplined as a result. I agree with the judge's analysis on this issue as well. Consequently, I would adopt his conclusion that the Respondent violated Section 8(a)(1) by threatening employ-

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Sec. 8(a)(1) by stating that replaced strikers would be reinstated only if the employer had openings when the strike was over, "but if the [r]espondent did not then have such openings the employees would lose their jobs"); and *Superior Emerald Park Landfill*, LLC, 340 NLRB 449, 462 (2003) (employer violated Sec. 8(a)(1) by stating that "if [employees] go on strike, they might not have a job to return to because the Company would not be required to rehire them if they had been permanently replaced").

The cases relied on by my colleagues are not persuasive authority to the contrary. With respect to *Novi-American*, 309 NLRB 544 (1992), a split panel decision, I agree with former Member Oviatt's dissent that the majority's decision departed from the letter and the spirit of *Eagle Comtronics*. *John W. Galbreath & Co.,* 288 NLRB 876, 877 (1988), can be distinguished on the ground that the employer explicitly disclaimed any intent to discharge the strikers.

ees with unspecified discipline if they engaged in protected activities that other employees may subjectively regard as "harassment."

Dated, Washington, D.C. June 29, 2007

Dennis P. Walsh, Member

NATIONAL LABOR RELATIONS BOARD

Ryan E. Connolly, Esq., for the General Counsel.
Cynthia K. Springer, Esq. (Baker & Daniels), of Indianapolis, Indiana, for the Respondent.

DECISION

STATEMENT OF THE CASE

ARTHUR J. AMCHAN, Administrative Law Judge. This case was tried in Milwaukee, Wisconsin, on May 5, 2005. The Union filed the charge in this matter February 23, 2004, and the General Counsel issued his complaint on April 20, 2004.

The General Counsel alleges that Respondent, Extendicare Health Services, Inc., violated Section 8(a)(1) of the Act by coercing employees regarding support for the Union by issuing a Memorandum on January 2, 2004, stating that employees had no obligation to pay union dues. The General Counsel also alleges that Respondent violated Section 8(a)(1) by issuing a letter to unit employees on January 21, 2004, threatening them with termination if they engaged in a strike; threatening unspecified discipline if employees engaged in protected activity and soliciting employees to report the protected activities of other employees to management. Finally, the General Counsel alleges that Respondent violated Section 8(a)(5) and (1) by increasing the cost of employee meals without prior notice to the Union and without affording the Union an opportunity to bargain with respect to this conduct and/or it effects.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, Extendicare Health Services, Inc., d/b/a River's Bend Health and Rehabilitation Center, operates nursing homes at various locations throughout the United States, including one in Manitowoc, Wisconsin. During calendar year 2003, Respondent had gross revenue exceeding $100,000 and purchased and received at its Manitowoc facility goods and materials valued in excess of $5000 from points outside the State of Wisconsin. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union, Local 913, American Federation of State, County and Municipal Employees (AFSCME), is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

Alleged 8(a)(1) violations

For a number of year prior to January 1, 2004, the Union has represented a bargaining unit that includes full-time and regular part-time certified nurse aides/nursing assistants/med techs/restorative aides, housekeepers, laundry aides, dietary aides, activities aides, office clericals, and cooks, at Respondent's Manitowoc facility. On January 1, 2004, Respondent became the owner of this facility.

The Union had a collective-bargaining agreement with the prior owner of the facility that ran from July 1, 2001, through June 30, 2004. Respondent declined to adopt that agreement, but rather commenced bargaining with the Union for a new contract. On January 2, 2004, Extendicare, by lo Schug, its human resource director, issued a memo to its employees, advising them that Respondent had informed the Union that it recognized it as the collective-bargaining representative of unit employees and that Respondent was available and willing to meet to negotiate a new contract. The memo also stated:

> Until a new contract between Extendicare and Local 913 is negotiated, there is no Union contract at River's Bend . . . . Until a contract with the Union is settled, Extendicare will not withhold Union dues from employee' paychecks. There is no obligation for Extendicare's employees to pay dues to Local 913.
>
> It is unknown how long it will take to negotiate a contract with Local 913. It is likely it could take several months . . . .

On January 15, 2004, Neil Rainford, the union staff representative servicing Respondent's Manitowoc facility, sent a notice to Respondent and the Federal Mediation and Conciliation Service (FMCS), informing them that the Union may picket, strike, or engage in other concerted refusal to work. His letter stated that "the above-referenced activities may commence on or after January 29, 2004." Respondent's counsel sent a letter to Rainford on January 19, opining that Section 8(g) of the Act required the Union to specify whether it intended to picket or strike. The Union responded the same day, by fax and email, informing Respondent, its counsel and the FMCS that "the Union will hereby revise its strike notice as follows: the strike will commence no earlier than 12:01 on the morning of January 31, 2004."

On January 21, 2004, Liz Reiss, Respondent's regional director of operations sent a letter to employees, which set forth Extendicare's position on the merits of the Union's strike notice. The letter stated in pertinent part:

> Dear Employee:
>
> On January 16, 2004, the Union sent Extendicare a strike notice, telling us it plans to strike on January 29, 2004, if we have not reached a contract by that date. This was after the Union had met with the Company just one time! Then, on January 19, 2004, the Union told us that it would not go on strike before January 31, 2004. To push you to go on strike, the Union is saying you lost wages and benefits when Exten-

> dicare took over. But the Union hasn't been totally honest about that . . . .
>
> It's important when you think about whether going on strike is a good idea, you look at all the facts . . . . Yet the Union is pushing you to accept nothing less than the same Union contract that led this facility into receivership. That just makes no sense.
>
> . . . The Union is pushing you to go on strike even though the Company responded to *every one* of the Union's first proposals, accepting more than 40 of them in *writing*. Your Union representatives are pushing you to go on strike even though they have not responded to *any* of the Company's first proposals in writing . . . . This is no way to negotiate a contract . . . .
>
> It is your decision whether or not to go on strike. What the Union may not tell you is that strikers do not receive a paycheck, strikers immediately lose company-paid medical benefits, and strikers do not get unemployment benefits. In a strike the Company would be forced to hire replacements to be sure we can take care of the residents. This puts each striker's continued job status in jeopardy.
>
> Some employees are telling us they are being harassed and threatened because they don't want to go on strike. We will not tolerate any River's Bend employee being harassed or threatened for any reason, and ask that you report any such conduct to management so we can ensure you can continue to work in a non-threatening environment.

In a letter dated January 19, but transmitted to Respondent on January 28, the Union revoked its January 19 strike notice.

Alleged 8(a)(5) violation

Prior to May 2003, Respondent's predecessor charged employees the follow amounts for meals: $1.75 for breakfast and supper; $2.25 for lunch. In May 2003, the prior management changed the prices to $2.25 for breakfast and supper; $3 for lunch.

On January 22, 2004, Respondent posted a notice (R. Exh. 9) announcing that effective February 16, 2004, all three meals would cost employees $3. Respondent did not give the Union prior notice of this change, nor did it offer to bargain about the change.

On April 30, 2004, upon being notified by the Regional Office that it was filing a complaint in this matter, Respondent notified employees that it would agree to rescind the January increases. On May 11, 2004, Extendicare rescinded the increase and offered employees reimbursement for any breakfast or supper meals purchased at the $3 rate after February 16. On May 14, Respondent reimbursed CNA Susan Hagenow $2.25 for amounts paid for three breakfast or supper meals.

Analysis

Compliant Paragraph 7: Alleged coercion in informing employees that they had no obligation to pay union dues.

I dismiss complaint paragraph 7 on the grounds that the General Counsel did not establish that Respondent's employees had any obligation to pay union dues. Therefore, there is no evidence that Respondent's assertion, that they had no such obligation, was false. Whether there was such an obligation may turn on the provisions of the Union's constitution and bylaws, which are not in the record, *Andal Shoe Inc*., 197 NLRB 1183 (1972). Moreover, the General Counsel's only witness, Union Staff Representative Neil Rainford, testified that he did not know whether or not Respondent's assertion was accurate.

Given the fact that Respondent's statement has not been shown to have been false, I conclude that it has not been established that it is coercive or violative of Section 8(a)(1).

Alleged Threat of Termination in the Event of a Strike (Complaint Paragraph 8 (b)(i))

The Board has, in a number of cases, addressed the issue of the degree of detail required of an employer, who informs employees that they are subject to replacement in the event of an economic strike. In *Eagle Comtronics, Inc*., the Board held that an employer may address the subject of striker replacement without fully detailing the reinstatement rights set forth in *Laidlaw Corp*., 171 NLRB 1366 (1968), so long as it does not threaten that, as a result of a strike employees will be deprived of their rights, such as the right to be reinstated if and when their permanent replacements are terminated. A statement, such as the one made by Respondent, that the hiring of replacements "puts each striker's continued job status in jeopardy," would therefore violate Section 8(a)(1) if the employer's comments were made in the context of a threatened economic strike, *Kentucky River Medical Center,* 340 NLRB 536, 546–547 (2003); *Wild Oats Markets, Inc.,* 344 NLRB No. 86, slip op. at 24–25 (2005); *Superior Emerald Park Landfill,* LLC, 340 NLRB 449, 462 (2003).

The issue in the instant matter, however, is complicated by the fact that the Union's strike notices of January 15 and 19, did not comply with the requirements of Section 8(g) of the Act, as interpreted by the Board in *Alexandria Clinic, P.A.*, 339 NLRB 1262 (2003). In that case, the Board held that the health care employer was entitled to terminate nurses who engaged in a strike 4 hours later than the time specified in the Union's strike notice. Thus, had any of Respondent's employees engaged in a strike pursuant to the Union's strike notices of January 15 and/or 19, Respondent could have legally discharged them.

The General Counsel, however, argues that Respondent's January 21 letter, violates Section 8(a)(1) because the threat to employees' "continued job status" is not tied to the inadequacy of the Union's strike notice and is broad enough to encompass lawful strike activity. Given the fact that there is no evidence that employees receiving the January 21 letter were aware of the shortcomings of the Union's strike notice, I agree with the General Counsel and find that the January 21 letter violated the Act. In the absence of any discussion of Section 8(g) and the inadequacy of the Union's strike notices, an employee would reasonably interpret the January 21 letter as threatening employees with the loss of their jobs in the event of any strike, regardless of its lawfulness. This is particularly true since the paragraphs preceding the discussion of employee status are confined to a discussion of the reasonableness of the Em-

ployer's bargaining position vis-a-vis the Union's. In this context the letter is most naturally read as referring to any strike activity, not just that which may be unlawful.

Alleged Solicitation of Employees to Report the Protected Activities of Other Employees to Respondent and Threat of Unspecified Disciplinary Action (Complaint Pars 8(b) (ii) & (iii))

It is well settled that the Act allows employees to engage in persistent union solicitation and other protected activity, including encouraging fellow employees to engage in an economic strike, even when it annoys or disturbs the employees who are being solicited. To that end Respondent's invitation to employees to report to management if they are being "harassed or threatened for any reason" is violative of Section 8(a)(1). Employees receiving Respondent's January 21, 2004 letter could reasonably believe that Respondent was asking them to report any unwelcome union activity, *Ryder Transportation Services*, 341 NLRB 761 (2004). Additionally, those inclined to engage in lawful union activity could reasonably have been discouraged from doing so. These employees could reasonably believe that their lawful activities might be reported to Respondent and that they could be subjected to discipline as a result, *Arcata Graphics,* 304 NLRB 541, 542 (1991).[1] I therefore find that Respondent violated Section 8(a)(1) as alleged in complaint paragraphs 8(b)(ii) and (iii).

Alleged Section 8(a)(5) violation: change in employee meal prices (Complaint paragraph 9)

I dismiss complaint paragraph 9 on the grounds that assuming that Respondent violated Section 8(a)(5), it cured this violation by posting the memoranda of April 30 and May 7, and by reimbursing the only employee who paid the extra 75 cents for meals.

On April 30, 2004, Respondent posted a memo entitled "Unfair Labor Practices." The memo stated that the NLRB had rejected the Union's unfair labor practice charges in most cases. However, in listing the Regional Office's findings, it stated, "The 50 cent price increase in meals was not legal. River's Bend will agree to cancel the price increase and reimburse employees."

> On May 7, Respondent posted another memo entitled "Meal Prices." The memo stated:
>
> We have been advised by the Regional Director for the National Labor Relations Board that River's Bend improperly increased meal prices on February 16, 2004, because we changed the meal price without negotiating with the union. The Regional Director has requested that we return meal prices to the prices that were in effect prior to February 16, 2004, and reimburse any bargaining unit employees who paid the increased price. We are honoring the Regional Director's request, effective immediately, by returning meal prices to $2.25 for dinner and $3.00 for lunch, and reimbursing the price difference to any bargaining unit employees who purchased meals since February 16.

The General Counsel argues that Respondent has not cured the violation because it failed to meet all the criteria set forth in *Passavant Memorial Area Hospita*l, 237 NLRB 138 (1978). Recently, in *Claremont Resort & Spa*, 344 NLRB No. 105 (2005), two of the three current Board members stated that they "do not necessarily endorse all the elements of *Passavant.*" In any event, by its terms the *Passavant* decision indicates that what an employer must do to cure a violation may depend on the nature of the violation. The *Passavant* case concerned a threat, which was communicated to 30–40 employees, that they would be fired if they engaged in an economic strike. In such a case, the Board found that repudiation must be (1) timely, (2) unambiguous, (3) specific to the coercive conduct, and (4) free from other prescribed illegal conduct. The Board distinguished the facts in *Passavant* from those in *Kawasaki Motors Corp., USA,* 231 NLRB 1151, 1152 (1978). In *Kawasaki,* it dismissed an allegation of a single incident of supervisor surveillance based upon the employer's simple disavowal of the supervisor's conduct.

I conclude that given the relatively minor importance of the 75 cent price increase, Respondent's April 30 and May 7 memoranda are sufficient to cure the violation of Section 8(a)(5) despite the fact that the repudiation does not completely accord with the *Passavant* criteria with regard to timeliness and lack of ambiguity. Moreover, I find that the memoranda, at least implicitly, concede that the price increase violated the Act due to Respondent's failure to bargain with the Union and implicitly provides assurance that Respondent will not increase meal prices in the future without bargaining.

SUMMARY OF CONCLUSIONS OF LAW

Respondent's January 21, 2004 letter to employees violated Section 8(a)(1) of the Act, as alleged in paragraphs of 8(b)(i), (ii), and (iii) in threatening employees with termination if they engage in a strike, regardless of whether or not the strike was lawful; soliciting employees to report the protected activities of other employees to Respondent and threatening employees with unspecified discipline if they engage in protected activities that other employees may subjectively regard as "harassment."

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[2]

[1] Chairman Battista dissented in Ryder because the employer's solicitation was limited to three employees who came to management with a complaint. He distinguished Ryder from Arcata Graphics which concerned an invitation to any employee to report "harassment."

[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes

ORDER

The Respondent, Extendicare Health Services, Inc., d/b/a River's Bend Health and Rehabilitation Center, Manitowoc, Wisconsin, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with termination if they engage in a lawful strike;

(b) Soliciting employees to report to Respondent information regarding the protected activities of other employees;

(c) Threatening employees with unspecified discipline if they engage in protected activities which are subjectively regarded as "harassment" by other employees.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its Manitowoc, Wisconsin facility, copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 30, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 21, 2004.

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C., June 29, 2005.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities

WE WILL NOT threaten you with termination if you engage in a lawful strike.

WE WILL NOT solicit employees to report to us the protected activities of other employees.

WE WILL NOT threaten you with unspecified discipline if you engage in protected activities that other employees may subjectively regard as "harassment."

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

RIVER'S BEND HEALTH AND REHABILITATION SERVICE

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."